United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original - Affidavits & Mailing

74-1155

To be argued by
KENNETH J. KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1155

UNITED STATES OF AMERICA,

Appellee,

—against—

RICHARD CEPULONIS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
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Of Counsel.

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Preliminary Statement

Appellant Richard Cepulonis appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*), entered on February 1, 1974, after a non-jury trial, convicting appellant of unlawfully possessing an automatic rifle which was not registered to him in the National Firearm Registration and Transfer Record, in violation of Title 26, United States Code, Section 5861(d) (Count One).*

On February 1, 1974, appellant was sentenced to a term of imprisonment of five years.

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* Appellant was charged in a two count indictment. Count Two charged the transportation of a firearm in interstate commerce by a person having been previously convicted of a felony, in violation of Title 18, U.S.C., § 922(g). Pursuant to stipulation, this count was not submitted to Judge Weinstein for determination.

On this appeal, appellant alleges that the firearm involved in count one was erroneously admitted in evidence in violation of his Fourth Amendment rights.

Statement of Facts

Prior to trial, a suppression hearing was held on the admissibility of the weapon. The parties agreed that should the Court deny the motion to suppress, the issue of guilt on count one would be submitted to the Court based upon the evidence introduced at the suppression hearing (3)* together with the following stipulated facts:

(1) the firearm in question was an M-16, A-1 automatic caliber 5.56, serial number 202-4903; (2) the firearm was not registered to the defendant in the National Firearm Registration and Transfer Record; (3) the firearm in question was seized from defendant's Ford Automobile located at LaGuardia Airport (p. 6 of October 25, 1973 record).

Agent Robert Marble, of the Federal Bureau of Investigation, testified at the suppression hearing, as did appellant Cepulonis and Mary Tracy, a female companion of the appellant who was present at the time of his arrest. Agent Marble stated that on September 15, 1973, he arrested Richard Cepulonis at the Holiday Inn Hotel on 57th Street in Manhattan (7, 19). The arrest was effected pursuant to a warrant charging unlawful flight in that Cepulonis did escape from Walpole State Prison in Massachusetts while serving a sentence of ten to twenty years for armed robbery (6-7). Prior to the arrest, the agents had been notified that Cepulonis was "armed and extremely dangerous", and that he was wanted for numerous bank robberies in the Boston area. Moreover, Cepulonis was known to be an associate of Francis Lovell, who had been

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* The numbers refer to record of suppression hearing and trial (October 25, 1973).

arrested earlier that day in the Skyway Motel in Queens, New York while in the possession of three loaded automatic weapons. The agents were also aware that an M-16 rifle had been used in connection with the Boston bank robberies (8-9).

During the course of a surveillance of the Holiday Inn, the agents arrested appellant in the hallway of the hotel, near the elevator. There they advised him of his constitutional rights (8-9). Realizing that appellant's female companion was in the hotel room, but not knowing if any other associate was present, the agents brought the appellant back to his room. The appellant knocked on the door and a woman answered. After a short delay, she opened the door and the agents entered the room. An immediate search of the bathroom and closet was conducted to determine whether there were any other occupants in the room (9-11). The agents then observed a bullet-proof vest "spread out and opened-up" lying on the bed (11). The appellant was asked if he had any guns, to which he replied, "no, go ahead and search", or "search". According to Agent Marble, Cepulonis replied in such a way as to indicate that he did not expect the agents to find anything (12).

Pursuant to appellant's directive, the agents searched a suitcase on the bed which disclosed two loaded automatic weapons. When asked to explain why he had denied possessing any weapons, appellant responded "I didn't know you meant those. I keep those for protection in this city" (12-13). Also seized from the room were seven clips for an M-16 rifle, a bandolier, a smoke grenade, bullet-proof vests, ammunition and $2,500 in cash (13-15).

The appellant was subsequently transported to the Federal Bureau of Investigation headquarters where he informed the agents that he would direct them to the M-16 rifles in which they were interested if the agents sent his female companion and her baby to Boston and gave her $500

(15). In the absence of any agreement between appellant and the agents, Cepulonis then indicated the rifles were located in the trunk of a black or dark blue Ford automobile, which he had last seen in the parking lot of the Skyway Motel in Queens. Appellant advised the agents that the vehicle was owned by an individual known as Joe Petrocelli, who the agents believed to be a "third subject" they were seeking (16-17).

The agents began a search of several parking lots at La-Guardia Airport on the following day, a Sunday. They finally located an automobile fitting the description of appellant's vehicle, a 1970 dark blue Ford with Ohio license plates.* Using the keys seized from the defendant's person at the time of the arrest, the agents were able to open the trunk of the car (18-19). Inside the trunk, in plain view, they observed a green bedsheet with the outline of guns clearly visible (18). They seized an M-16 rifle and a Marlin rifle (18-19).

The appellant testified at the hearing that he did not consent to the search of his room or the car (45-46). He admitted that he was an escapee from prison, that he was in possession of certain weapons, that he owned the car from which the rifles were seized, and that the car keys were on his person at the time of his arrest (52-58).

Mary Tracy, appellant's female companion, testified that she was on the other side of hotel room when appellant conversed with the agents, and might not have heard all of the conversation between the agents and appellant (44). She stated that she did not give her consent to the search of the room, nor did she hear appellant give his consent (34-35).

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* The agents were in possession of a bill of sale for the car which indicated an Ohio registration, although not stating the plate numbers (63).

ARGUMENT

The motion to suppress the weapon seized from the trunk of appellant's car was properly denied.

In predicating his appeal upon an allegation of constitutional error in the admission of the weapon seized from the trunk of his car, the appellant sets forth two arguments: (1) that the knowledge leading to the seizure of the M-16 rifle contained in the trunk of his Ford automobile resulted from the unconstitutional search of the appellant's hotel room; and (2) that the subsequent warrantless search of the car disclosing the weapon was unconstitutional. Neither of these arguments can withstand judicial scrutiny.

As Judge Weinstein observed in denying appellant's motion to suppress the weapon, "the locating of the car was not based upon any search of the hotel room. It was based on information obtained by independent leads and by search of the defendant, which was perfectly lawful in view of the existing warrant" (65). The agents were aware of the probable existence of the M-16 rifle before they arrested the appellant. The keys to the car which appellant had on his person at the time of arrest were lawfully obtained pursuant to an incidental search. *Chimel* v. *California,* 395 U.S. 752 (1969). Thereafter, in an interview at F.B.I. headquarters, after his arrest pursuant to a valid arrest warrant for unlawful flight, appellant voluntarily disclosed the information that the weapon could be found in the trunk of a black or dark blue Ford which he claimed belonged to a "Joe Petrocelli". Based upon this information, which was obtained independently of the events at the hotel,* the F.B.I. began a search leading to the dis-

* The court might well have found that the search of the hotel room was, in any event, lawful. The agents testified that appellant told them to "go ahead and search" or "search" the hotel room (12). If believed by the trier of the facts, such language, uttered in the absence of any threat of force or coercion, could be found to be a voluntary consent to search, negating the need for a search warrant. *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973).

covery of the car in question in a parking lot at LaGuardia Airport.

Appellant's contention that the M-16 rifle should have been excluded as the fruit of an unconstitutional, warrantless search is wholly without merit. It is now well established that the "exigent circumstances" surrounding the search of a movable vehicle have given rise to an exception to the general rules that "a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant". *Cady* v. *Dombrowski*, 413 U.S. 433, 439 (1973). See also *Carrol* v. *United States*, 267 U.S. 132 (1925); *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Chambers* v. *Maroney*, 399 U.S. 42 (1969); *United States* v. *Carneglia*, 468 F.2d 1084 (2d Cir.), *cert. denied*, 410 U.S. 945 (1972). As the Supreme Court recently reiterated in *Cady, supra*, "[a]lthough vehicles are 'effects' within the meaning of the Fourth Amendment, 'for purposes of the Fourth Amendment there is a constitutional difference between houses and cars'" 412 U.S. at 439. A warrantless search which would be *per se* unreasonable and unconstitutional in the case of a home or other fixed piece of property may be reasonable and lawful in the case of a movable vehicle, where the circumstances dictate the impracticability of first securing a warrant. *Cooper* v. *California*, 386 U.S. 58, 59 (1967); *United States* v. *Carneglia, supra*.

The circumstances surrounding the discovery and search of the appellant's automobile manifest the impracticability of requiring a warrant in this case. By virtue of the appellant's own admissions, the agents had reason to believe that the car they finally located on a Sunday in an airport parking lot contained dangerous weapons. Appellant further led the agents to believe that a third person, "Joe Petrocelli", owned and had access to the car. Since such third party might, at any time, have moved the car and the dangerous weapons from the parking lot and the jurisdic-

tion, the exigencies of the situation made a warrantless search imperative. *McDonald* v. *United States,* 335 U.S. 450, 456 (1948).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Brooklyn, New York
May 15, 1974

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Cepulone

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 17th day of May 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ X two copies of the brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Joseph J. Lombardo, Esq.
16 Court Street
Brooklyn, New York 11241

Sworn to before me this
17th day of May 1974

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19 75

Deborah J. Amundsen

DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

_____ Action No.____

UNITED STATES DISTRICT CO
Eastern District of New Yor

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within __
_____is hereby admitted.

Dated: _____,

_____

Attorney for _____

FPi-LC-5M-8-73-7355